UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARIA SANTILLAN, FLORA RODRIGUEZ SANTILLAN, JAMIE RODRIGUEZ SANTILLAN, ANGELA DESOUZA, MARCOS SOSA CARTAGENA, ZIBER ISMAILI, ANITA LASBREY, ZOILA LOPEZ-GONZALEZ, RAFAELA VALDEZ PARRA, MARIA VALDA MOHAMAD, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

JOHN ASHCROFT, Attorney General of the United States; TOM RIDGE, Secretary of the Department of Homeland Security; THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS); EDUARDO AGUIRRE, JR., USCIS Director; DAVID STILL, USCIS San Francisco District Director,

Defendants.

_____/

No. C 04-2686 MHP

ORDER

Plaintiffs Maria Santillan, et al., seek certification of a class consisting of persons who have been or will be granted lawful permanent resident status by the Justice Department's Executive Office of Immigration Review and to whom the United States Citizenship and Immigration Services has failed to issue evidence of status as a lawful permanent resident. The class definition excludes those plaintiffs to other actions pending in Florida and Texas district courts. Having considered the arguments of the parties, and for the reasons set forth below, the court issues the following order.

BACKGROUND

Named Plaintiffs Maria Santillan, et al., were granted the status of lawful permanent resident ("LPR") by Immigration Judges or by the Board of Immigration Appeals, constituent courts of the Justice Department's Executive Office of Immigration Review ("EOIR"). Following the EOIR's determination, plaintiffs sought documentation of their adjusted status as LPRs from their local U.S. Citizenship and Immigration Services ("USCIS") suboffice, through a process called Alien Documentation, Identification and Telecommunication ("ADIT") processing.

Under policies commenced in the aftermath of September 11, 2001, all applicants for documentation of their adjusted status through ADIT processing must undergo background and security checks involving multiple federal agencies. See Sposato Decl. ¶¶ 1-9. Until those checks are completed, the USCIS is not permitted to issue any immigration benefit to plaintiffs, such as adjustment of status to lawful permanent residency or the issuance of temporary documentation verifying LPR status. See Sposato Decl. ¶¶ 11-12.

Plaintiffs allege that under this current system, LPRs are waiting from several months to over one year for the commencement of their ADIT processing, as well as long time periods for the completion of processing and the issuance of documentation verifying LPR status. See Plaintiffs' Exhs. A-J. They allege that during this post-adjudication, pre-documentation period, many immigrants are losing work and travel authorization due to the expiration of their former immigration status, the refusal of agencies to renew work authorizations due to the immigrants' adjustment to LPR status, and lack of documentation of their new LPR status. See, e.g., Santillan Decl. ¶¶ 10-14; Rodriguez Santillan Decl. ¶¶ 10-13. On July 4, 2004, plaintiffs filed an action for declaratory and injunctive relief, seeking to compel defendant officials to issue LPRs evidence of their adjusted legal status "in a timely manner."

Since the date of filing their complaint, a period of only two and one-half months, the status of all ten originally named plaintiffs has changed. After waiting periods of 10 to 20 months, seven named plaintiffs received documentation of their lawful permanent resident status during the period

of July 30, 2004 through mid-September, 2004, and the three remaining plaintiffs were summoned to commence ADIT processing. See Sposato Supplemental Decl. ¶¶ 1-2. In a separate motion pending before this court, plaintiffs have moved to add six new named plaintiffs to their complaint. See Pl.'s Mot. to for Leave Amend. According to plaintiffs, these proposed new named plaintiffs have not received or been summoned to receive documentation of their LPR status, as they remain in the middle of various stages of pre-ADIT or ADIT processing. Id. at 4; Exh. 1-6.

LEGAL STANDARD

I. Article III Justiciability

The jurisdiction of federal courts depends on the existence of a "case or controversy" under Article III of the Constitution. PUC v. FERC, 100 F.3d 1451, 1458 (9th Cir. 1996). Inquiry into a plaintiff's standing under Article III is a jurisdictional requirement that must be satisfied prior to class certification. LaDuke v. Nelson, 762 F.2d 1318, 1325 (9th Cir. 1985). The present motion for class certification raises questions relating to three dimensions of justiciability: standing, mootness, and ripeness. See Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001) (noting that standing, class certification, and the scope of relief are "often intermingled").

A. Standing

Article III § 2 of the Constitution extends the judicial power of the federal courts only to cases or controversies. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 101 (1998). Under Article III, federal courts cannot entertain a litigant's claims unless that party has satisfied its burden to demonstrate both constitutional and prudential standing to sue. Defenders of Wildlife v. Lujan, 504 U.S. 555, 560 (1992). To meet constitutional requirements, a plaintiff must show that (1) it has suffered an "injury in fact" which is "concrete and particularized" and "actual or imminent"; (2) the injury is fairly traceable to the challenged actions the by defendant; and, (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." Id. at 560-61 (internal quotations and citations omitted). Prudential requirements for

standing include: (1) whether plaintiff's alleged injury falls within the "zone of interests" protected by the statute or constitutional provision at issue, (2) whether the complaint amounts to generalized grievances that are more appropriately resolved by the legislative and executive branches, and (3) whether the plaintiff is asserting his or her own legal rights and interests, rather than those of third parties. See Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172, 1179 (9th Cir. 2000); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Powers v. Ohio, 499 U.S. 400, 410 (1991).

B. Mootness

"A claim is moot if it has lost its character as a present, live controversy." American Rivers v. National Marine Fisheries Service, 126 F.3d 1118, 1123 (9th Cir. 1997) (citing American Tunaboat Ass'n v. Brown, 67 F.3d 1404, 1407 (9th Cir. 1995)). "In the context of declaratory and injunctive relief, [a plaintiff] must demonstrate that she has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that she will again be wronged in a similar way." Bird v. Lewis & Clark College, 303 F.3d 1015, 1019 (9th Cir. 2002) (internal quotation marks and citation omitted), cert. denied, 538 U.S. 923. Where the activities sought to be enjoined have already occurred and the courts "cannot undo what has already been done, the action is moot." Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978). "The burden of demonstrating mootness is a heavy one." Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1243 (9th Cir. 1988).

In the class action context, the mootness of named plaintiffs does not defeat the class claims where unnamed class members continued to present justiciable claims and where the class has already been certified under Rule 23. See County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991). Certification itself brings unnamed class members before the court for Article III purposes, and therefore the mooting of a named plaintiff's claims does not require dismissal. Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (holding that a mooted named plaintiff challenging a one-year residency requirement could continue to represent a certified class because "[a]lthough the

controversy is no longer alive as to [named plaintiff], it remains very much alive for the class of persons she has been certified to represent" and because otherwise "the issue sought to be litigated escapes full appellate review at the behest of any single challenger"). Before class certification, however, the mootness of named class members will bar adjudication of the Rule 23 motion unless the case falls into a recognized exception to mootness doctrine, for instance where the challenged conduct is transitory. See County of Riverside, 500 U.S. at 52 (upholding a certified class despite pre-certification mootness of named plaintiffs' claims because the "inherently transitory" nature of some claims would deny any realistic chance for class certification before proposed a representative's personal interest would expire).

Mootness doctrine also recognizes an exception for claims which are "capable of repetition yet evading review." Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1509 (9th Cir. 1994); Wiggins v. Rushen, 760 F.2d 1009, 1011 (9th Cir. 1985). This exception is limited to extraordinary circumstances where two elements combine: (1) the challenged action is of limited duration, too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. Porter v. Jones, 319 F.3d 483, 489-90 (9th Cir. 2003); Wiggins, 760 F.2d at 1011. When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and is moot. See PUC v. FERC, 100 F.3d 1451, 1460 (9th Cir. 1996). After certification of a class action, the second element articulated in Porter will be satisfied even where a named plaintiff may not personally be subjected to the short-duration harm again. See Sosna, 419 U.S. at 399-400 (affirming class certification where a challenged practice could not be enforced personally against named plaintiff again, but would be enforced against other class members).

C. Ripeness

"Ripeness doctrine protects against premature adjudication of suits in which declaratory relief is sought," Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1044 (9th Cir. 1999) (en banc), in order to prevent "entanglement in theoretical or abstract disagreements that do not yet have a concrete impact

on the parties." 18 Unnamed "John Smith" Prisoners v. Meese, 871 F.2d 881, 883 (9th Cir. 1989). The ripeness inquiry contains both a constitutional and a prudential component. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc).

II. Overbreadth

The requirements of Rule 23 protect defendants from "overbroad" class definitions. See Amchem Products, Inc., v. Windsor, 521 U.S. 591, 560 (1997). Rule 23 does not, however, limit the geographic scope of a certified class. Califano v. Yamasaki, 442 U.S. 682, 702 (1979). A nationwide class is permissible under principles of equity because "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." Id. When asked to certify a nationwide class, a district court must ensure that nationwide certification is appropriate, and that such certification would not "improperly interfere with the litigation of similar issues in other judicial contexts." Id. Accordingly, district courts may shape the contours of a nationwide class to exclude pending cases addressing similar issues, thus avoiding interference with other courts. See Ali v. Ashcroft, 346 F.3d 873, 888 (9th Cir. 2003). See also Lundquist v. Security Pac. Automotive Financial Serv. Corp., 993 F.2d 11, 14 (2d Cir.1993) (holding that a district court "is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly").

III. Rule 23

A party seeking to certify a class must satisfy four prerequisites enumerated in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements of Rule 23(b). The prerequisites of Rule 23(a) include: (1) numerosity (a class so large that joinder of all members is impracticable); (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class). In addition, Rule 23(b) requires a showing that the action is maintainable under Rule 23(b)(1), (2), or (3). See Rule 23(b). Plaintiffs assert that this case

falls within Rule 23(b)(2). Rule 23(b)(2) permits class actions for declaratory or injunctive relief where the party opposing the class "has acted or refused to act on grounds generally applicable to the class." Rule 23(b)(2).

The party seeking relief must provide facts sufficient to satisfy the requirements of Rule 23(a) and (b). In ruling on a motion to certify, the court accepts as true a plaintiff's allegations in the complaint, as long as the court has sufficient information to form a reasonable judgment on the class certification requirements. See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (holding that "[s]o long as [a district judge] has sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material, his approach cannot be faulted because plaintiffs' proof may fail at trial"). Courts may not review the merits of a case for purposes of class certification, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974), except as necessary to perform a rigorous Rule 23 analysis. See Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983). Rule 23 confers "broad discretion" on district courts to determine eligibility for certification and subsequently revisit that determination. Armstrong v. Davis, 275 F.3d 849, 872 n.28 (9th Cir. 2001).

DISCUSSION

I. Justiciability of Plaintiff's Case

A. Standing

Named plaintiffs in the present action declare that they have been denied evidence of temporary registration pending security clearance, and that without such documentation of their adjusted status, they have not been entitled to the employment, travel, educational, and public benefits privileges granted to legal permanent residents. See Plaintiffs' Decls., Exhs A-J. As a motion to certify a class is not a review of the substantive merits of a case, this court is not in a position to evaluate the veracity or scope of these injuries. See Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). The declarations simply provide adequate allegations of injuries on which to base a reasonable judgment

that they have personal standing to bring this case, given the direct effect of the contested government policies on plaintiffs themselves. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (holding that in suits challenging the legality of government conduct, the nature of the facts necessary to establish standing is considerably diminished if the plaintiff himself is "an object of the action...at issue," rather than a third party to the government action).

In order to assert claims on behalf of a class, named plaintiffs must demonstrate that they have personally sustained an injury which results from a challenged statute or government conduct. See Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir. 2001). The Ninth Circuit has described two means of making such a demonstration: first, plaintiffs may show that defendant had a written policy sanctioning the contested conduct, or second, plaintiffs may show that the harm is part of a pattern of officially-sanctioned conduct. Id. at 861. In defendants' opposition motion and attached declaration, the government has conceded the existence of policies and practices requiring background checks of all recently-adjusted LPRs, and they have detailed the required stages and actors involved in such clearances. See Sposato Decl. ¶¶ 1-13. Named plaintiffs, for their part, have alleged injuries which stem directly from the defendants' policies regarding issuance of temporary documentation of status, as well as from the time required to implement the background check policies. See Plaintiffs' Decls. A-J. The court finds that the plaintiffs have satisfied the requisite showing of an injury derived from challenged government policies and practices.

Defendants also argue that plaintiffs have exclusively alleged past harms which cannot recur. Defendants are correct that past harms, with an uncertain chance of repetition, are an inadequate basis on which to establish standing. See Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that the plaintiff's past injury did not establish a personal stake in prospective relief because he did not face an immediate threat of future injury). However, the Ninth Circuit has distinguished Lyons from cases in which a written policy or common practice ensures repetition in the future. See LaDuke v. Nelson, 762 F.2d 1318, 1324 (1985) (holding that the case at bar was distinct from Lyons in that the district court made a finding of "a standard pattern of officially sanctioned officer behavior"). In the present action, the existence of clear policies and practices within the Department of Homeland

Security mean that unnamed and future class members will face the contested delays in the future. See Sposato Decl. ¶ 13 (describing security clearance procedures and stating that the USCIS will "continue to perform" background checks). The present action therefore satisfies the LaDuke and Armstrong standards for establishing standing on behalf of a class. In addition, the injuries allegedly sustained by the named plaintiffs (excluding those seven plaintiffs who were recently documented as LPRs) represent a present, on-going harm rather than a "past injury" subject to the Lyons standing rule. Until they receive documentation of their status, there has been no termination of the harm and thus there is no question as to their standing to bring this case. Once a class is certified, termination of the harm for individual named plaintiffs does not defeat the standing of the class. See LaDuke, 762 F.2d at 1325 (holding that "the fact of certification will preserve a class's standing even after the named individual representatives have lost the required personal stake") (internal citations omitted).

Subject to other justiciability concerns, the named plaintiffs have alleged adequate injury to establish standing to represent a class of similarly-situated individuals.

B. Mootness

Since the filing of this case, seven named plaintiffs have received temporary or permanent documentation of LPR status after the successful completion of their background checks. See Sposato Supplemental Dec. ¶ 1. In addition, barring unforeseen clearance issues, the other three originally-named plaintiffs have been scheduled to appear to receive documentation of their adjusted LPR status following the issuance of this order. See Sposato Supplemental Dec. ¶ 2 (stating that Maria Santillan de Lopez, Flora Rodriguez Santillan, and Jaime Rodriguez Santillan are currently in the process of background and security checks). The defendants argue that the claims of these seven plaintiffs – and potentially of others as proceedings before this court advance – are now moot, rendering these named plaintiffs incapable of certification as class representatives.

There is no question that three of the ten named plaintiffs' claims present live controversies, as per the discussion of standing above. Until receiving temporary or permanent documentation of their status as LPRs, their alleged injuries continue. For the seven named plaintiffs who have

received documentation of their status, their claims have been mooted by the resolution of their conflict with defendants. See Friends of the Earth, Inc. v. Bergland, 576 F.2d 1377, 1379 (9th Cir. 1978) (holding that where the activities sought to be enjoined have already occurred and the courts cannot undo any harm caused, the action is moot.)

Plaintiffs have asked this court to preserve all ten named plaintiffs as class representatives, applying the rule announced in Zeidman v. McDermott, 651 F.2d 1030 (5th Cir. 1981) that a motion for class certification brought before a district court need not be dismissed for mootness where defendants, perhaps strategically, have tendered resolution of individual plaintiff's claims. Id. at 1051. The court reasoned that plaintiffs could be "picked off" before class certification, making a decision on class certification very difficult to procure. Id. at 1050. Indeed, the Supreme Court has expressed concern over a "narrow class of cases" where the ability of defendants to defeat adversity with one named plaintiff at a time would "lead to the reality that otherwise the issue would evade review." Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 341 (1980) (internal citations omitted).

This court declines to adopt the Zeidman rule here. The Ninth Circuit has suggested that in order to show strategic resolution of named plaintiffs' claims in response to litigation, plaintiffs must show causation, not simply correlation, between the timing of the litigation and the timing of defendants' resolution of the contested harm. Sze v. INS, 153 F.3d 1005, 1008 (9th Cir. 1998). On the evidence currently before the court, plaintiffs have not demonstrated such causation, and it will not be inferred by this court.

Therefore, the claims of seven named plaintiffs are deemed mooted by the issuance of documentation of LPR status in their cases. This modification in the plaintiffs' class representation has no effect on the viability of the class as a whole. See Swisher v. Brady, 438 U.S. 204, 213 (1978) (holding that a live controversy remained, and a class was properly certified, where the adversity between the defendant and all but one of the named plaintiff had been mooted). In addition, the court notes that subsequent resolution of remaining named plaintiffs' claims following certification of this class will not moot this class action as whole. See County of Riverside v.

McLaughlin, 500 U.S. 44, 52 (1991) (holding that the mootness of named plaintiffs does not defeat class claims where unnamed class members continued to present justiciable claims and where the class has already been certified under Rule 23).

C. Ripeness

Defendants' last justiciability argument is that the claims of unnamed future persons seeking LPR status are unripe. This argument misunderstands ripeness, an Article III doctrine concerning the timing of judicial intervention in a dispute and the appropriateness of a matter for declaratory relief. See Renne v. Geary, 501 U.S. 312, 320, 111 S. Ct. 2331, 115 L. Ed. 2d 288, 301 (1991). By contrast, the inclusion of unnamed class members who will be affected in the future by a challenged policy or practice is a common characteristic of class actions seeking to curtail ongoing harms. See, e.g. I.N.S. v. Nat'l Ctr. for Immigrant Rights, 502 U.S. 183 (1991) (addressing the merits of a class action representing "all those persons who have been or may in the future be denied the right to work pursuant to 8 CFR § 103.6"); Haitian Refugee Center, Inc. v. Nelson, 694 F.Supp. 864, 876-78 (S.D. Fla. 1988) (granting class certification of a class of all persons who had or would for adjustment of immigration status under a particular program) aff'd by 872 F.2d 1555 (11th Cir. 1989); Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996) (addressing the merits of a class consisting of "[a]ll persons who are, have been, or will be identified as 'disabled' under Chapter 346 . . ."); LaDuke v. Nelson, 762 F.2d 1318, 1321, 1332 (9th Cir. 1985) (affirming certification of a class consisting of "[a]ll persons who have resided or will reside in particularly described farm housing . . ."); Etuk v. Blackman, 748 F.Supp. 990, 994 (E.D.N.Y. 1990) (certifying a class of persons "whose permanent resident cards either have been or will be confiscated by the INS . . .") aff'd in relevant part by Etuk v. Slattery, 936 F.2d 1433 (2nd Cir. 1991).

The fact that a class will eventually encompass plaintiffs who do not currently satisfy the class definition does not defeat Article III justiciability, subject to the requirements of standing for current class members. See Sosna v. Iowa, 419 U.S. 393, 402-03 (1975). To interpret the ripeness doctrine otherwise would preclude claims for injunctive relief on behalf of any "constantly

changing" class, in which new plaintiffs enter the class definition by virtue of the passage of time. See Sze v. INS, 153 F.3d 1005, 1010 (9th Cir. 1998) (noting the difference between a justiciable "constantly changing putative class," in which "some members leave the class and others come in," and a non-justiciable "constantly shrinking plaintiff class," in which the contested procedures have been changed and no new plaintiffs are entering the class). A class may include future members as long as the court will be able to determine whether an individual is a class member at any given time. See Probe v. State Teacher's Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986); 5 James Wm. Moore et al., Moore's Federal Practice § 23.31[2] (3d ed. 2004). In the present action, this court can easily determine those persons who fall within the class definition, namely, persons granted LPR status by an EOIR tribunal "to whom USCIS has failed to issue evidence of registration as a lawful permanent resident." Ripeness therefore is not a barrier to class certification in the present action.

II. Overbreadth

Defendants have raised two concerns with respect to the breadth and clarity of the putative class. They argue, first of all, that class certification in the current case will conflict with two other pending lawsuits on similar matters: Lopez-Amor, et al. v. U.S. Attorney General, et al., No. 04-CV-21685 (S.D. Fla.) (involving 34 individual plaintiffs served by the Miami, Florida USCIS district office) and Padilla, et al. v. Ridge, et al., No. M 03-126 (S.D. Tex.) (a class action limited to persons granted LPR status by immigration courts located in Harlingen, Houston, and San Antonio, Texas). Secondly, defendants argue that the class definition is unclear on the meaning of "evidence of registration."

Defendants express valid concern about interference with pending litigation. A district court must ensure that nationwide class certification will not interfere with litigation of similar issues elsewhere. See Califano v. Yamasaki, 442 U.S. 682, 702 (1979). However, this concern has been addressed by a modification in the scope of the class to exclude the relatively small cluster of plaintiffs represented in Padilla and Lopez-Amor. Due to the limited geographic scope of the other cases, the modification of the class in the present action avoids potential problems of interference

and overbreadth. See Ali v. Ashcroft, 346 F.3d 873, 888 (9th Cir. 2003) (upholding certification of a nationwide class because the government defendant was applying its policy nationally and holding that "by defining the class to exclude pending cases, [the district court] had obviated concerns about impinging on other courts.")

Defendants' other argument concerning the meaning of "failure to issue registration" goes to the heart of the merits of this case, as does any determination of what would constitute "reasonable delay" in the issuance of evidence of LPR status. Plaintiffs declare that they received no documentation of their adjusted status following the EOIR's determination in their cases. See Plaintiffs' Decls, Exhs A-J. Failure to issue documentation pre-ADIT processing is not contested between the parties, as defendants have confirmed that the USCIS is mandated to perform background checks prior to issuance of LPR documentation after EOIR adjudication of status. Related issues remain disputed, such as the necessity of delays between adjudication to documentation of status and the ministerial obligation to provide temporary or interim documentation of status pending background checks. However, these questions are beyond the scope of the present motion to certify, going to the heart of the merits of the case and the nature of available relief. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156,177-78 (1974) (holding that courts may not review the merits of a case for purposes of class certification); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (holding that investigation of substantive allegations should be limited to the analysis necessary to perform a rigorous Rule 23 analysis).

III. Rule 23(a)

A. Numerosity

Pursuant to Rule 23, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As a general rule, classes numbering greater than 41 individuals satisfy the numerosity requirement. See 5 James Wm. Moore et al., Moore's Federal Practice § 23.22[1][b] (3d ed. 2004). Although plaintiffs need not allege the exact number or identity of class members to satisfy the numerosity prerequisite, mere speculation as to the number of

parties involved is not sufficient to satisfy the numerosity requirement. See Freedman v. Louisiana-Pac. Corp., 922 F. Supp. 377, 398 (D. Or. 1996); 7 Wright, Miller, & Kane, Federal Practice and Procedure § 1762.

Where a class is not so numerous as to establish joinder as impracticable on its own, other factors such as "the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder." Jordan v. Co. of Los Angeles, 669 F.2d 1311, 1319 (9th Cir. 1982), vacated on other grounds by 459 U.S. 810 (1982). The economic and legal resources of the plaintiff class may be a factor in determining the practicality of joinder. See Sherman v. Griepentrog, 775 F.Supp. 1383, 1389 (D. Nev. 1991) (holding that poor, elderly plaintiffs dispersed over a wide geographic area could not bring multiple lawsuits without great hardship). In addition, the inclusion of unknown future class members supports the impracticality of joinder. Id.

Plaintiffs have provided evidence of more than 49 removal-adjusted LPRs in five states who satisfy the putative class definition. See Bauerle Decl., Exh. K ¶ 11 (attorney declaration asserting representation of 11 immigrants satisfying the class definition); Bratton Decl., Exh. L ¶ 5 (attorney declaration asserting representation of 20 immigrants satisfying the class definition); Calero Decl., Exh. M ¶ 5 (attorney declaration asserting representation of 15 immigrants satisfying the class definition); Neugebauer Decl., Exh. N ¶ 11 (attorney declaration asserting representation of 3 immigrants satisfying the class definition); and Pradis Decl., Exh. O ¶ 5 (attorney declaration asserting representation of "several" immigrants satisfying the class definition). Plaintiffs assert that these putative class members are a minimal cross section of the nationwide class, which may exceed 20,000 based on estimates from 2003 statistics. See Department of Justice, Executive Office of Immigration Review, FY 2003 Statistical Year Book, Exh. P (documenting the number of persons grated LPR status in removal proceedings in fiscal year 2003).

Plaintiffs contend that due to the geographic diversity and the scale of the putative class, joinder would be impracticable. This court agrees. Defendants have acknowledged that the contested policies and procedures are national in application, and thus apply to all immigrants

seeking documentation of adjusted status after adjudication by an EOIR court. See Sposato Decl. ¶¶ 2-3, ¶¶ 6-12. Indeed, based on plaintiffs' evidence estimating the total class size, the nationwide class of affected persons must be substantial. See Westcott v. Califano, 460 F.Supp. 737, 744 (D.Mass.1978), aff'd, 443 U.S. 76 (1979) (holding that a court may draw a reasonable inference of class size from the facts before it). Defendants' contention that plaintiffs must identify the percentage of their clients who have not received timely evidence of registration is irrelevant to the court's determination at this stage, and it contradicts defendants' own acknowledgment of current lag times between adjudication and documentation. Furthermore, assessment of the legality or reasonableness of any given delay goes directly to the merits of this action.

Plaintiffs also contend that individual class members lack the ability to institute individual actions because they tend to possess limited economic resources and fear retaliation for filing suit. See, e.g., Bauerle Decl., Exh. K ¶ 19. Limited economic resources may indeed limit the ability of class members to bring individual lawsuits and provide one factor in assessing whether joinder is impracticable. See Lynch v. Rank, 604 F.Supp. 30, aff'd, 747 F.2d 528 (9th Cir. 1984). The court has no information on which to base a finding regarding the economic welfare of class members, and therefore the practicality of joinder will not be assessed on that basis. However, the court acknowledges the probability that such evidence weighs in plaintiffs' favor under the Lynch standard.

The court thus finds that plaintiffs have satisfied their burden to show that joinder of removal-adjusted LPRs, both current and future, would be impracticable, and thus, this requirement of their Rule 23 motion is satisfied.

B. Commonality

To fulfill the commonality prerequisite of Rule 23(a)(2), plaintiffs must establish that there are questions of law or fact common to the class as a whole. Rule 23(a)(2) does not mandate that each member of the class be identically situated, but only that there be substantial questions of law or fact common to all. See Harris v. Palm Spring Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir.

1964). Individual variation among plaintiffs' questions of law and fact does not defeat underlying legal commonality, because "the existence of shared legal issues with divergent factual predicates is sufficient" to satisfy Rule 23. Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

In the present action, plaintiffs challenge the USCIS's national practices following a grant of LPR status by the EOIR assert that USCIS has a duty to issue documentation evidencing that adjusted status in a timely manner. They share substantially identical questions of law, and factual differences within the class are immaterial. All of the proposed class members in this action were adjudicated to be LPRs by a court of the EOIR, either an immigration judge or the Bureau of Immigration Appeals. The fact that named plaintiffs came through the former process and not the latter is an immaterial difference, as by defendants' description of current processes, all "defensive" adjustments of status commencing with an EOIR determination are handled the same way. See Sposato Decl. ¶¶ 2, 6-9. It is clear that all plaintiffs, whether present or future members of the class, are challenging the legality of the same government program and thus inherently share common issues. See, e.g., LaDuke v. Nelson, 762 F.2d 1318, 1332 (9th Cir. 1985) (holding that the constitutionality of an INS procedure"plainly" created common questions of law and fact).

Defendants' arguments against commonality turn on the merits of plaintiffs' arguments, i.e. whether the time taken to complete background checks is "reasonable and lawful" and whether defendants are fulfilling their "duty" to issue evidence of status. However, this court again determines that the reasonableness and legality of defendants' policies and practices are the very essence of this case, and not matters for the court on a motion for class certification.

Therefore, the plaintiffs have satisfied the commonality requirement of Rule 23 (a)(2).

C. Typicality

Under Rule 23(a)(3), the claims of the representative plaintiffs must be typical of the claims of the class. To be considered typical for purposes of class certification, the named plaintiffs need not have suffered an identical wrong. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Rather, the class representative must be part of the class and possess the same interest and

suffer the same injury as the class members. See General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982). As under Rule 23(a)(2), where a plaintiff class challenges government policies or practices, named plaintiffs will be found typical of the class if they allege similar harms as the class. See, e.g., Hodgers-Durgin v. De La Vina, 165 F.3d 667, 679 (9th Cir. 1999) (harms to class representatives found typical of those of other class members in case alleging unconstitutional patterns and practices by border patrol agents).

The named plaintiffs in this action allege a range of harms relating to access to educational benefits, employment authorization, travel privileges, public benefits, and other consequences of immigration status which would be typical of any individual who has been adjudged an LPR, but lacks documentation of that status. This typicality resides equally with future members of the class, as defendants do not contest the continuation of current policies for the indefinite future. According to the defendants' description of current polices for "defensive" adjudications of immigration status (i.e., adjudication by an EOIR tribunal), all class members must undergo a background check. See Sposato Decl. ¶¶ 1-12. Future members of the class thus will share the same questions regarding their immigration status pending the check, or the timeliness or reasonableness of delays in documentation. The absolute length of time required to complete a background check will certainly vary (for instance, because of backlogs, or because the results of a past security check of an immigrant remain current). However, these differences are immaterial for purposes of class typicality, which is concerned with the class members' shared interests and harms. See generally General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982).

Thus, plaintiffs satisfy the requirements of Rule 23(a)(3).

D. Adequacy of Representation

Rule 23(a)(4) dictates that the representative plaintiffs must fairly and adequately protect the interests of the class. To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. See Hanlon, 150 F.3d at 1020 (citing Hansberry v. Lee, 311 U.S. 32, 42-43 (1940)). "Resolution of two questions

determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Id.

This court finds no conflicts of interest between the named and absent class members, as all plaintiffs seek injunctive relief to provide documentation of status for the benefit of the entire class. The seven named plaintiffs who received documentation of their LPR status prior to commencement of this action have been eliminated as class representatives, and thus their commitment to advocating for unnamed class members is no longer at issue.

The court has confidence in the ability of both the named class members and their counsel to vigorously pursue the present action, and thus Rule 23(a)(4) is satisfied.

II. Rule 23(b)

Even if a putative class of plaintiffs satisfy the prerequisites of Rule 23(a), they cannot satisfy their burden to establish that the action is maintainable as a class under Rule 23 unless they meet one of the three categories described in Rule 23(b). Plaintiffs argue that they meet the requirements of 23(b)(2).

A. Rule 23(b)(2)

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). In the present action, defendants describe a set of national policies and practices in place for background and security checks prior to issuance of documentation of adjusted LPR status, and thus implicitly acknowledge a set of actions "generally applicable to the class." See Sposato Decl. ¶¶ 1-13. Defendants' semantic argument over whether they acted or refused to act is irrelevant; whether the challenged conduct is characterized as the failure to issue documentation (a refusal to act) or the application of security procedures prior to issuance of documentation (an action), it easily falls

within the scope of Rule 23(b)(2). Plaintiffs seek injunctive relief to change these national policies and practices, and thus plainly satisfy the dual requirements of Rule 23(b)(2).

CONCLUSION

Based upon the foregoing, IT IS HEREBY ORDERED that:

1) Plaintiffs' motion to certify a class is GRANTED.

2) The class consists of all persons who were or will be granted lawful permanent resident status by the EOIR, through the Immigration Courts or the Board of Immigration Appeals of the United States, and to whom USCIS has failed to issue evidence of registration as a lawful permanent resident, with the exception that the class excludes the 34 named plaintiffs in Lopez-Amor v. U.S. Attorney General, No. 04-CV-21685 (S.D. Fla.) and the plaintiff class in Padilla v. Ridge, No. M 03-126 (S.D. Tex.).

3) The named class representatives are: Maria Santillan, Flora Rodriguez Santillan, and Jamie Rodriguez Santillan.

4) The counsel of named plaintiffs is counsel for the class.

IT IS FURTHER ORDERED that counsel shall confer and submit a proposed class notice in compliance with this order within thirty (30) days of the date of this order.

Dated: October 12, 2004

Marilyn Hall Patel
United States District Court
Northern District of California